IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 8

ROBERT L. SCHLAGENHAUF, *Petitioner*

v.

CALE J. HOLDER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA, *Respondent*

On Writ of Certiorari from the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

ROBERT S. SMITH
13 North Pennsylvania Street
Indianapolis, Indiana

WILBERT MCINERNEY
One Thousand Connecticut Avenue
Washington, D. C.

DAVID A. STECKBECK
13 North Pennsylvania Street
Indianapolis, Indiana

CHARLES T. BATE
13 North Pennsylvania Street
Indianapolis, Indiana

Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 8

ROBERT L. SCHLAGENHAUF, *Petitioner*

v.

CALE J. HOLDER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA, *Respondent*

On Writ of Certiorari from the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF FOR THE PETITIONER

The Petitioner files this reply brief directed to the contentions of the Respondent that this Court in reaching its decision should disregard the constitutional provisions, federal statutes and federal rules involved and to confine its interpretation exclusively to Rule 35(a), Federal Rules of Civil Procedure (Res. Br. 2). Secondly, that this Court should disregard the record before the United States Court of Appeals for the Seventh Circuit and substitute a record incorporated in the brief of the Respondent as an appendix (Res. Br. 4, 8, 16, 17, 18).

The Respondent relies heavily upon *Sibbach* [1] and *Beach*.[2] These decisions certainly did not disregard constitutional provisions, federal statutes and federal rules involved and the violation of substantive rights. In fact, both courts were considerably concerned with substantive rights. In *Sibbach*, the court emphasized that there could be no restriction on substantive rights when it stated "The first is that the court shall not 'abridge, enlarge, nor modify the substantive rights,' in the guise of regulating procedure." In *Beach* the court was also concerned as to whether substantive rights were being abridged, enlarged or modified.

These two decisions were made at a time when the Federal Rules of Civil Procedure were in their infancy. Since then court decisions interpreting the rules have filled volumes of reports. The courts, however, have jealously refused to interpret Rule 35(a) in any way which would interfere with the substantive rights of a litigant in civil litigation.

In both *Sibbach* and *Beach* there were well reasoned dissenting opinions that Rule 35(a) should not be invoked to overrule *Union Pacific R. Co. v. Botsford*, 141 U.S. 250.

While this Court in *Sibbach* held that the plaintiff should submit to a physical examination, there was nothing to indicate that the Court contemplated that an examination would be made without a showing of the requirements embraced in Rule 35(a).

In *Beach* the court was very careful to restrict its ruling to the blood test requested. In doing this, it is

---

[1] *Sibbach* v. *Wilson & Co., Inc.*, (1941), 312 U.S. 1, 61 S. Ct. 422, 85 L. Ed. 479

[2] *Beach* v. *Beach*, (App. D.C. 1940), 114 F. 2d 479, 3 F. R. Serv. 35a.5, Case 2.

difficult to believe that the court ever intended that its decision would be construed to prompt the question insofar as this Petitioner is concerned, "What harm does this cause Petitioner?" Nor would it be contemplated that the language of the court would be subjected to the paraphrase, "if the examination shows nothing was wrong with Petitioner, he certainly was not harmed; and if the examination shows his physical or mental condition caused this tragic accident, a miscarriage of justice has been averted" (Res. Br. 11).

There is nothing in either decision to indicate that either court was establishing a precedent which twenty-four years later would justify physical and mental examinations of all "parties" in civil litigation under Rule 35(a).

The Respondent attempts in support of his position that there would be inconsistency in different substantive rights and constitutional privileges (Res. Br. 18). Keeping in mind the large number of decisions already applying to an interpretation of the Federal Rules of Civil Procedure and the many decisions to come, there probably will be plaintiffs asserting substantive and constitutional rights if mental and physical examinations are ordered. Assuming a plaintiff was claiming personal injury to an arm or a leg, it would be difficult to believe he would willingly submit to examinations by two doctors each in the respective fields of internal medicine, ophthalmology and psychiatry and three in the field of neurology.

The record in the United States Court of Appeals for the Seventh Circuit was certified to this Court and incorporated in the Transcript of Record at the direction of the Petitioner and Respondent and under the direction of the Clerk of this Court.

The petition for writ of mandamus was filed in the United States Court of Appeals for the Seventh Circuit on March 13, 1963. Judgment was entered on July 23, 1963 affirming the decision of the District Court (T. 84). At no time prior to the filing of the writ of mandamus and judgment of the court, was a modification of the order requiring nine examinations made. Obviously it was contemplated that if the decision of the District Court was affirmed, the Petitioner would be required to subject himself to the nine examinations. On September 18, 1963, however, the Respondent entered an order in the proceedings in the United States District Court for the Southern District of Indiana, Indianapolis Division, reducing the number of examinations from nine to four. It is now contended that this becomes the valid order in the case and that the record before the United States Court of Appeals for the Seventh Circuit should be disregarded (Res. Br. 8, 17). In fact, it was contended in the brief filed by the Respondent in opposition to the petition for certiorari that the signing of this order on September 18, 1963 made this question now before the Court moot (Br. for Res. in Opp. 2, 7). It is even suggested by the Respondent that the reduction in the number of examinations would be such that the Petitioner should voluntarily submit to the four examinations (Res. Br. 16). The position of the Petitioner is that he should not be required to submit to examinations by four doctors any more than he would be required to submit to examinations by nine doctors. The mere reduction in the number of doctors in itself is not controlling. If the number could be reduced to four, it could be reduced to six. By the same reasoning, if the number of doctors to make the examinations is controlling, it could be increased from nine. The posi-

tion of the Petitioner is that under all circumstances involved in this particular case, he should not even be examined by one doctor.

In any proceedings involving an interpretation of Rule 35(a) the substantive and constitutional rights of the person to be examined should at all times be safeguarded and the interpretation of this rule should not be confined to the rule itself.

The Appendix made a part of the Respondent's brief fails to conform with Rule 40-5 of this Court in that it is irrelevant and immaterial to the facts and issues in this cause based upon the Transcript of Record as printed at the request of the Clerk of this Court. Those portions of the Respondent's brief to which reference is made to the Appendix made part of the brief should be disregarded.

Respectfully submitted,

ROBERT S. SMITH
13 North Pennsylvania Street
Indianapolis, Indiana

WILBERT MCINERNEY
One Thousand Connecticut Avenue
Washington, D. C.

DAVID A. STECKBECK
13 North Pennsylvania Street
Indianapolis, Indiana

CHARLES T. BATE
13 North Pennsylvania Street
Indianapolis, Indiana

Counsel for Petitioner